Supreme Court, U. S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-311

GENERAL ADJUSTMENT BUREAU, INC. and
PROPERTY LOSS RESEARCH BUREAU,
Petitioners,

VERSUS

MAC ADJUSTMENT, INC., and B. J. GOSTING,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

D. Kent Meyers
Jim K. Goodman
John J. Love
CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK
1700 Liberty Tower
Oklahoma City, Oklahoma 73102
and
Clarence W. Olmstead, Jr.
SHEARMAN & STERLING
53 Wall Street
New York, New York 10005
Counsel for Petitioner,
General Adjustment Bureau, Inc.

Burck Bailey
Terry W. Tippens
Margaret McMorrow Love
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2700 First National Center
Oklahoma City, Oklahoma 73102
Counsel for Petitioner,
Property Loss Research Bureau

August, 27, 1979

UTTERBACK TYPESETTING CO. — PHONE 235-0030 — 3740 S. HOLLIDAY AVE. — OKLA. CITY, OKLA. 73115

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Opinion Below, Permitting an Antitrust Plaintiff to Defeat Summary Judgment Which Challenges the Jurisdictional Predicate of the Action By Failure to Submit Any Evidence to Show the Existence of the Required Nexus With Interstate Commerce, Will Create Serious Problems in the Orderly Administration of the Federal Judicial System	6
II. The Opinion Below Erroneously Condemns the Use of an Evidentiary Hearing by the District Court in Its Consideration of a Motion for Summary Judgment Which Challenges the Jurisdictional Predicate of the Action	11
CONCLUSION	14
APPENDIX A—Complaint filed in U.S. District Court for the Western District of Oklahoma (Oct. 26, 1976)	A-1
APPENDIX B—Memorandum Opinion and Order of the U.S. District Court for the Western District of Oklahoma (Aug. 23, 1977)	B-1

TABLE OF CONTENTS — PAGE

APPENDIX C—Order of U.S. District Court for the Western District of Oklahoma Sustaining Defendants' Motions for Summary Judgment (Sept. 27, 1977) C-1

APPENDIX D—Judgment of the U.S. Court of Appeals, 10th Circuit, reversing the Judgment of the U.S. District Court for the Western District of Oklahoma (Apr. 30, 1979) D-1

APPENDIX E—Order of U.S. Court of Appeals, 10th Circuit, denying Petition for Rehearing (June 1, 1979) E-1

TABLE OF AUTHORITIES

Cases — PAGE

Arrington v. The City of Fairfield, Alabama, 414 F.2d 687 (5th Cir. 1969) 13

Bufalino v. Michigan Bell Telephone Company, 404 F.2d 1023 (6th Cir. 1968), cert. den., 394 U.S. 987 (1969) 13

Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F.2d 569 (9th Cir. 1948), cert. den., 336 U.S. 924, reh'g den., 336 U.S. 995, reh'g den. 337 U.S. 961 (1949) 12

Chan Wing Cheung v. Hamilton, 298 F.2d 459 (1st Cir. 1962) 13

Fender v. General Electric Company, 380 F.2d 150 (4th Cir. 1967) 13

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, reh'g den., 393 U.S. 901 (1968) 9

Georgia Southern and Florida Railway Company v. Atlantic Coast Line Railroad Company, 373 F.2d 493 (5th Cir.), cert. den., 398 U.S. 851 (1967) 13

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 9

Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738 (1976) 7, 8

Las Vegas Merchant Plumbers Association v. United States, 210 F.2d 732 (9th Cir. 1954), cert. den., 348 U.S. 817, reh'g den., 348 U.S. 889 (1954) 7

Page v. Work, 290 F.2d 323 (9th Cir.), cert. den., 368 U.S. 875 (1961) 8

Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) 10

AUTHORITIES CONTINUED PAGE

United States v. Yellow Cab Company, 332 U.S. 218 (1947) 8

Rules

Fed. R. Civ. P. 43(e) 11

Miscellaneous

Moore's Federal Practice, §56.11[8] 12

10 Wright and Miller, Federal Practice and Procedure, §2723 12

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

GENERAL ADJUSTMENT BUREAU, INC. and PROPERTY LOSS RESEARCH BUREAU,
Petitioners,

VERSUS

MAC ADJUSTMENT, INC., and B. J. GOSTING,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, General Adjustment Bureau, Inc. and Property Loss Research Bureau, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 30, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 597 F.2d 1318 (10th Cir. 1979) and appears in the Appendix hereto. The opinion and order of the United States District Court for the Western District of Oklahoma were not published, but appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered April 30, 1979. A timely Petition for Rehearing and Suggestion for Rehearing en Banc was denied on May 30, 1979, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court was invoked under Section 1 of the Sherman Act, 15 U.S.C. § 1, and under 28 U.S.C. § 1337.

QUESTIONS PRESENTED

1. Whether the plaintiff in a Sherman antitrust case must show, in response to a Motion for Summary Judgment which challenges only the jurisdictional predicate of plaintiff's action, the existence of a sufficient nexus with interstate commerce to warrant the exercise of federal jurisdiction.

2. Whether a Federal District Court may conduct an evidentiary hearing in considering a Motion for Summary Judgment which challenges only the jurisdictional predicate of plaintiff's action.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

"§ 1. Trusts in Restraint of Trade Illegal:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Federal Rules of Civil Procedure:

"Rule 43(e): Evidence on Motions.

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition."

STATEMENT OF THE CASE

Respondents, Mac Adjustment, Inc., and its president and sole owner, B. J. Gosting, filed suit in the United States District Court for the Western District of Oklahoma, under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that petitioners conspired to damage Mac's adjusting business. A copy of the complaint is reproduced in the Appendix hereto. Petitioners filed answers denying the existence of any alleged conspiracy and further stating that the matters complained of neither occurred in the flow of, nor substantially affected, interstate commerce.

At the first pretrial conference held in this matter, on March 1, 1977, the District Court requested that the parties conduct discovery on the two jurisdictional questions raised by the pleadings, i.e., the applicability of the McCarran-Ferguson exemption (15 U.S.C. § 1101, *et seq.*) and further, whether there in fact existed the required nexus between the alleged conspiracy and interstate commerce. During the ensuing six-month period, respondents made no attempt to conduct any discovery. Petitioners propounded Interrogatories to the respondents, and conducted an exhaustive search of documents produced by the respondents which allegedly showed the existence of the nexus with interstate commerce.

In their Answers to Interrogatories, respondents acknowledged that they were in competition only with other Oklahoma adjusting firms, and that the sole office of Mac Adjustment, Inc. was, and always had been located in Ponca City, Oklahoma. The sole damage which was caused by the alleged conspiracy was to respondents' adjusting business in Ponca City, Oklahoma.

At the conclusion of this first phase of discovery, petitioners filed Motions for Summary Judgment on the two jurisdictional issues noted above. After considering the briefs, the District Court denied petitioners' motions insofar as they related to the McCarran exemption, for the reason that the acts complained of were not the "business of insurance", as that term is used in the McCarran Act. In its opinion, the District Court specifically reserved ruling on the interstate commerce issue, and set the matter down for further pretrial conference to determine the proper method of developing the record to permit a ruling on that question.

At the second pretrial conference, held on August 30, 1977, the court determined that an evidentiary hearing should be held at which all parties would be permitted to present evidence on the interstate commerce issue. The court invited all parties to present adffiavits or other evidence to the court prior to this hearing.

On September 15, 1977, the evidentiary hearing was held, during which respondents presented the testimony of Mr. Gosting and some thirty-seven exhibits which allegedly showed the existence of the required nexus between the alleged conspiracy and interstate commerce. The

District Court made no attempt to limit the introduction of any evidence.

During the course of Mr. Gosting's testimony, he indicated that, while he could cross state lines in order to adjust an insurance claim, he rarely did so; the normal practice was to refer out-of-state claims to adjusters located in the vicinity of the loss. In fact, of the 1400-1500 adjustments performed by respondents during the time they were engaged in business, only seven or eight could be shown to have occurred in a location outside the State of Oklahoma.

Respondents presented no additional evidence to the court at the evidentiary hearing, and, in response to an inquiry from the court, they indicated that no additional facts could be developed if further discovery were permitted. Finding that there was no possibility of additional evidence which would warrant a trial, the District Court thereupon granted both of the petitioners' Motions for Summary Judgment, and dismissed the respondents' Complaint with prejudice.

On appeal, the Court of Appeals for the Tenth Circuit reversed, holding, *inter alia*, that the utilization of an evidentiary hearing in passing upon a Motion for Summary Judgment was unauthorized by the Federal Rules of Civil Procedure, and that plaintiffs should be given an opportunity to develop further evidence on the jurisdictional question. A timely Petition for Rehearing and Suggestion for Rehearing en Banc was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW, PERMITTING AN ANTITRUST PLAINTIFF TO DEFEAT SUMMARY JUDGMENT WHICH CHALLENGES THE JURISDICTIONAL PREDICATE OF THE ACTION BY FAILURE TO SUBMIT ANY EVIDENCE TO SHOW THE EXISTENCE OF THE REQUIRED NEXUS WITH INTERSTATE COMMERCE, WILL CREATE SERIOUS PROBLEMS IN THE ORDERLY ADMINISTRATION OF THE FEDERAL JUDICIAL SYSTEM.

The District Court below attempted to provide for the orderly disposition of what could have developed into a highly complex and lengthy lawsuit. At the outset, the parties and the District Court agreed that discovery should be limited to the jurisdictional questions raised by the pleadings. During the six months which elapsed between the first pretrial conference and the dismissal of their case, respondents made no effort to conduct any discovery whatsoever. When presented with petitioners' Motions for Summary Judgment which were based upon the admissions made and documents produced by respondents, they made no effort to show the required nexus between the alleged conspiracy and interstate commerce.

Rather, respondents limited their answer to the Motions for Summary Judgment to legal argument by way of briefs, and the testimony of Mr. Gosting at the evidentiary hearing. The facts presented by respondents to the District Court showed no impact whatsoever upon interstate commerce, but rather merely attempted to establish that respondents' business had been injured. In its

opinion, the Court of Appeals correctly characterized Mr. Gosting's testimony as "not satisfactory" for this very reason. Despite this, the Court of Appeals reversed the entry of Summary Judgment, in effect holding that petitioners should be forced to a jury trial simply because respondents failed to show the necessary impact on interstate commerce.

It is well settled that a plaintiff claiming relief under the Sherman Act must demonstrate that the actions of defendant either impeded the flow of, or substantially and adversely affected interstate commerce. See e.g., *Hospital Building Co.* v. *Trustees of the Rex Hospital*, 425 U.S. 738 (1976). As the Court of Appeals for the Ninth Circuit has summarized this two-fold test:

> "A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two theories:
>
> 1. That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.
>
> 2. That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially affected interstate commerce." *Las Vegas Merchant Plumbers Association* v. *United States*, 210 F.2d 732, 739, fn. 3 (9th Cir. 1954), cert. denied, 348 U.S. 817, reh'g denied, 348 U.S. 889 (1954).

In the District Court, respondents were unable to show that the alleged conspiracy occurred in the flow of interstate commerce. Rather, they argued that the business of insurance, taken as a whole, operated in interstate commerce; respondents argued that because they were part of

the business of insurance, *ipso facto*, any conspiracy directed toward them would automatically have occurred in the flow of interstate commerce. The District Court properly rejected this theory. As this Court has noted, "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. . . ." *United States* v. *Yellow Cab Company*, 332 U.S. 218, 231 (1947).

Similarly, the respondents failed to demonstrate that the alleged conspiracy had a substantial and adverse effect upon interstate commerce. In fact, respondents presented no evidence of any effect whatsoever, adverse or otherwise, on commerce. Respondents evidently believed that it would be sufficient for them to show that they had been injured, without presenting any proof of an effect upon commerce. Such a showing is insufficient to warrant the exercise of federal antitrust jurisdiction. See, e.g., *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

Petitioners acknowledge that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 746. However, petitioners would note that in the *Rex Hospital* case, the District Court had entered a dismissal under Rule 12, Federal Rules of Civil Procedure, for the failure of the complaint to state a claim upon which relief could be granted. Mr. Justice Marshall, writing for the Court specifically pointed out, however:

> "It may, of course, be that even though Petitioner's complaint adequately alleges an effect on interstate commerce, further proceedings in this case will demonstrate that Respondents' conduct, in fact involves no violation of law, or indeed no substantial effect on interstate commerce element." *Gulf Oil Corp.* v. *Copp Trustees of Rex Hospital*, 425 U.S. 738, 747, n. 5.

In the case at bar, Petitioners heeded this admonition, and conducted extensive discovery solely on the interstate commerce question. Petitioners thereafter filed their Motions for Summary Judgment under Rule 56. As this Court has noted, in a decision under the Robinson-Patman Act:

> "There is no objection to use, in appropriate cases, of Summary Judgment procedure to determine whether there is a genuine issue of material fact as to the interstate commerce elements." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 203, n. 19 (1974).

In reversing the District Court's Entry of Summary Judgment in this case, the Court of Appeals ignored the mandate of this Court in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-290, *reh'd denied*, 393 U.S. 901 (1968). In that decision, in response to the defendant's Motion for Summary Judgment under Rule 56, plaintiff failed to produce any evidence showing the existence of a conspiracy. In affirming the granting of Summary Judgment to the defendant, this Court held:

> "To the extent that Petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get a jury on the basis of the allegations in their complaint, coupled with the hope that something can be developed at the trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims,

we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

The District Court thus properly followed the guidelines set down by this Court in its dismissal of respondents' action. The granting of Summary Judgment under Rule 56 was the most appropriate method of disposing of this litigation. It also exemplifies the type of case discussed by Mr. Justice Harlan in his dissenting opinion in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962). Writing for four members of this Court, he stated:

"In administering the rule (Rule 56, Fed. R. Civ. P.), the availability of pretrial discovery, as well as matter actually discovered, is a factor to be considered in determining whether a 'genuine issue as to any material fact' is open. (Citation omitted). Further, the Rule does not indicate that it is to be used any more 'sparingly' in antitrust litigation than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others. On the contrary, without reflecting in any way upon the good faith of this particular lawsuit, having regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the Summary Judgment rule its full legitimate sweep in this field." 368 U.S. at 478.

The opinion below condemns the use of Summary Judgment in cases in which an antitrust plaintiff himself

fails to establish the required nexus between the activities of which he complains and interstate commerce. In so holding, the Court of Appeals has permitted such plaintiffs to proceed to a jury trial based solely upon their complaint, coupled with their own failure to develop the evidence on the commerce question. The consequence of such a ruling, especially in the complex field of antitrust litigation, would undoubtedly compound the heavy caseload of the already beleaguered federal judiciary. Because of this, petitioners respectfully suggest that this Court exercise its discretion and grant a writ of certiorari to the Court of Appeals to review this judgment.

II.

THE OPINION BELOW ERRONEOUSLY CONDEMNS THE USE OF AN EVIDENTIARY HEARING BY THE DISTRICT COURT IN ITS CONSIDERATION OF A MOTION FOR SUMMARY JUDGMENT WHICH CHALLENGES THE JURISDICTIONAL PREDICATE OF THE ACTION.

The District Court, after considering the briefs of the parties and the evidence before it on the Motions for Summary Judgment filed by petitioners, found that the record was not complete, and required supplementation. Thereafter, at the second pretrial conference, the District Court directed that the matter be set down for an evidentiary hearing, evidently relying upon the clear language of Rule 43(e), Federal Rules of Civil Procedure, which states:

"Evidence on Motions. When a Motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or deposition."

Rather than hearing the matter on affidavits, the District Court permitted respondents to present any facts in their possession at the evidentiary hearing.

It has long been accepted that Rule 43(e) is fully applicable to Motions for Summary Judgment under Rule 56. See, e.g., Moore's Federal Practice, ¶ 56.11[8]; 10 Wright and Miller, Federal Practice and Procedure, § 2723. Despite this, and even though respondents never argued that the evidentiary hearing was improper, the Court of Appeals below so held.

Despite the apparently clear language of Rule 43(e), the opinion below states:

> "There is, of course, no provision in the Rules of Civil Procedure for having a hearing of the kind that was here conducted, that is, an *in limine* hearing to decide whether or not the plaintiffs could sufficiently satisfy the jurisdictional requirement of being engaged in interstate commerce so as to justify going to trial."

The Courts of Appeals for other circuits that have considered the propriety of holding evidentiary hearings during proceedings on a Motion for Summary Judgment have concluded that such hearings are, indeed, proper. One of the first decisions to consider such a procedure was *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F.2d 569 (9th Cir. 1948), *cert. denied,* 336 U.S. 924 *reh'g denied,* 336 U.S. 955, *reh'g denied,* 337 U.S. 961 (1949). The Court of Appeals for the Ninth Circuit in that decision characterized the procedure of permitting an evidentiary hearing on a Rule 56 motion for summary judgment as being "both rational and in harmony with the spirit and

the purpose of the Rules of Civil Procedure. See R. Civ. P. 43(e)." 170 F.2d at 573. To the same effect is *Fender* v. *General Electric Company,* 380 F.2d 150, 152 (4th Cir. 1967).

The holding of such an evidentiary hearing has been reviewed without express comment by the Court of Appeals for the Sixth Circuit. *Bufalino* v. *Michigan Bell Telephone Company,* 404 F.2d 1023 (6th Cir. 1968) *cert. denied,* 394 U.S. 987 (1969). The First Circuit, in reviewing this procedure, has criticized it, but without expressly disapproving of its use. *Chan Wing Cheung* v. *Hamilton,* 298 F.2d 459 (1st Cir. 1962). The Court of Appeals for the Fifth Circuit has considered the question on two occasions, once criticizing, but not expressly disapproving of its use, *Georgia Southern and Florida Railway Company* v. *Atlantic Coast Line Railroad Company,* 373 F.2d 493 (5th Cir.) *cert. denied,* 398 U.S. 851 (1967), and once reviewing such a procedure without express comment, *Arrington* v. *The City of Fairfield, Alabama,* 414 F.2d 687 (5th Cir. 1969).

The opinion rendered below by the Court of Appeals for the Tenth Circuit marks the first time that a Court of Appeals has expressly condemned and prohibited the use of evidentiary hearings in passing on a Motion for Summary Judgment. Thus, that decision not only violates the express mandate of Rule 43(e), Federal Rules of Civil Procedure, but it has created a conflict among the circuits. Petitioners therefore respectfully suggest that the instant case is appropriate for review by this Court, and that a writ of certiorari should be granted to review the opinion rendered below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

D. Kent Meyers
Jim K. Goodman
John J. Love
CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK
1700 Liberty Tower
Oklahoma City, Oklahoma 73102
(405) 235-7700

and

Clarence W. Olmstead, Jr.
SHEARMAN & STERLING
53 Wall Street
New York, New York 10005
(212) 483-1000

Counsel for Petitioner,
General Adjustment Bureau, Inc.

Burck Bailey
Terry W. Tippens
Margaret McMorrow Love
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2700 First National Center
Oklahoma City, Oklahoma 73102
(405) 232-0621

Counsel for Petitioner,
Property Loss Research Bureau

August, 27, 1979

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

MAC ADJUSMENT, INC., an Oklahoma Corporation, and B. J. GOSTING, Plaintiff,	)	
vs.	)	CIV-76-0848-E
GENERAL ADJUSTMENT BUREAU, INC., a New York Corporation, and PROPERTY LOSS RESEARCH BUREAU, an unincorporated association, Defendants.	)	

COMPLAINT

I.

This complaint is filed and the proceedings are instituted under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended, commonly known as the Sherman Act to recover damages for injury by defendants to the business and property of plaintiff sustained by reason of violations by defendants as hereinafter alleged. Plaintiff seeks the recovery of threefold damages by him sustained, and the costs of suit, including a reasonable attorney's fee, all as provided by Title 15 U.S.C.A. § 15.

II.

This court has jurisdiction of the subject matter of this complaint under the Act of June 25, 1948, 62 Stat. 931; Title 28 U.S.C.A. § 1337.

III.

Plaintiff Mac Adjustment, Inc. is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal place of business in the City of Ponca City, County of Kay, State of Oklahoma, engaging in the insurance adjustment business as an independent adjuster for various insurance companies both within and without the State of Oklahoma. In conducting its business plaintiff competes and at all times herein mentioned has competed with other independent adjusting firms, including the defendant corporation, General Adjustment Bureau, Inc.

IV.

Defendant, General Adjustment Bureau, Inc., is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its home office at 123 William Street in the City of New York, State of New York. Said defendant is and at all times herein mentioned was engaged in the insurance adjustment business throughout the United States and in certain foreign countries, maintaining some 600 different branch offices, adjusting claims filed against various insurance companies by persons who have sustained losses for which they seek to be compensated by insurance, and in direct competition with plaintiff and other independent adjusting firms. The business conducted by these independent adjusting firms and corporations, including that of the plaintiff and the defendant, is carried on in interstate commerce. Adjustments are made of claims filed in numerous cities and states throughout the United States for insurance companies which are engaged in business within many different cities and states throughout the United States, in return for the payment of money.

Defendant, Property Loss Research Bureau, is an unincorporated association of Chicago, Illinois and has as its members, some 100 insurance companies, among which is

Iowa Mutual Insurance Company, a company licensed to do business in the State of Oklahoma.

As a direct and proximate result of the defendants' violations as set forth in the following paragraphs, which violations constituted an illegal restraint of trade under Section 1 of the Sherman Act, the plaintiff has been injured in its business and property in diverse ways, as will be hereinafter set forth.

V.

Between November 19, 1973, and December 20, 1974, and at other subsequent times known to the defendants but unknown to the plaintiff, the defendant, General Adjustment Bureau, acted in concert with Property Loss Research Bureau in an effort to coerce, direct, influence and thereby cause insurance companies, including Iowa Mutual, to refuse and refrain from doing business with plaintiff, MAC Adjustment, Inc. In this connection, defendants engaged in a concerted attempt to injure and destroy the plaintiff's competitive position in the adjusting business by the use of means which were not within the area of fair and honest competition. Defendants made false, fraudulent and unjustified statements and reports to Iowa Mutual Insurance Company, to other insurance companies, to Southwest Adjustment Company, and to certain insurance agents representing insurance companies, and even to individual insureds, with all of whom the plaintiff had dealt or would have dealt in the future, regarding the plaintiff's ability, competency, honesty and integrity in the handling of losses in the adjustment business. These statements were false, and known to be false at the time they were made; were made to injure the plaintiff's competitive position in the adjusting business and resulted in unlawfullly increasing defendants' businesses, at the expense of plaintiff. Said acts of defendants occurred in the Western District of Oklahoma.

As a direct and proximate result of these particular violations the plaintiff has sustained the following injuries to its business and property:

1. Plaintiff has as a result of said actions, acquired a reputation in the insurance industry among many companies, agents and other adjusting firms and corporations, with whom he had dealt or would have dealt, that he does not possess the qualities necessary to be considered a competent adjuster. Because of the acts of the defendants, plaintiff's reputation in the adjusting business has been severely damaged to the extent that companies, agents and other adjusting firms and corporations are no longer willing to do business with plaintiff, causing damage to the plaintiff as hereinafter set forth.

2. Plaintiff's competitive position in the insurance adjusting business has been severely damaged to the extent that he can no longer compete, with any degree of success, with defendant, General Adjustment Bureau, and others engaged in the independent adjusting business causing damage to the plaintiff as hereinafter set forth.

VI.

Defendant, General Adjustment Bureau, has continued from November of 1973 to the present, to act in concert with, collude, conspire, combine, and cooperate with Property Loss Research Bureau and others known to the defendants but unknown to the plaintiff, in a deliberate and calculated effort to destroy the plaintiff's adjusting business, with an intent to capture as General Adjustment Bureau's own, the business which plaintiff had been handling, and to further prevent the plaintiff from expanding its business.

Although plaintiff's President, B. J. Gosting, was employed as an adjuster by the defendant, General Adjustment Bureau, from the years 1963 through 1972, the said defendant, though requested throughout 1975 and 1976, has

refused to verify B. J. Gosting's previous work history with defendant to enable the plaintiff to become listed and thereby advertise in the "Claim Service Guide", a publication which is the only source of detailed information about adjusters, including their personal background, with lines of insurance handled and references verified. Plaintiff has made numerous requests of said defendant to provide such verification but said defendant has refused to cooperate. Defendant's actions made it impossible for plaintiff to obtain a verified listing in the aforesaid publication and has and will continue to result in a loss of anticipated business to the plaintiff for the reason that a verified listing in said publication would have been a potential source of additional business to the plaintiff. Defendant's refusal to verify plaintiff's work history was a calculated effort and attempt on the part of the officers, directors and representatives of the defendants to restrain plaintiff's business and thus to impede the free exercise of competition in the adjusting business, and was a direct and proximate cause of damage to the plaintiff as hereinafter set forth.

VII.

Defendant, General Adjustment Bureau, acted in concert with insurance companies during the year of 1973 and at other times thereafter to conspire and agree to establish uniform practices and procdures to be used in the adjustment and settlement of insurance claims. In essence, said defendant has been engaging in "quality control checks" for these insurance companies by reviewing the work done by the plaintiff and other independent adjusters such as the plaintiff. This has given said defendant an unfair advantage in the adjusting industry and enabled said defendant to eliminate competition and restrain trade by treating itself and causing others in the insurance industry to treat said defendant's practices and procedures as a uniform standard or guide to be used in the adjustment and settlement of insurance claims. Plaintiff has sustained

damage as hereinafter set forth as a direct and proximate result of this concerted effort, conspiracy and agreement of both defendants to restrain trade and impede free competition in the adjusting business.

VIII.

The defendants' actions as set forth in paragraphs V through VII, inclusive, constitute violations of the Sherman Act, Section 1, and directly and proximately caused injury to plaintiff's business by illegally restraining trade and destroying the plaintiff's competitive position in the adjusting business. The defendants' acts have unduly restrained, hindered and suppressed competition between plaintiff and defendants in the adjusting business in interstate commerce, and plaintiff has thereby been damaged in the total sum of $750,000.00. Under said U.S.C.A., Title 15, Section 15, plaintiff is entitled to recover from defendant treble damages and costs of suit, including a reasonable attorney's fee.

WHEREFORE, plaintiff prays for judgment against defendannts in the amount of $750,000.00, said amount to be trebled in accordance with the provisions of U.S.C.A., Title 15, Section 15, making a total of $2,250,000.00, for plaintiff's costs of suit, including reasonable attorney's fees, and for such other and further relief as the court may deem just and proper.

(s) B. J. Gosting
B. J. Gosting
President of MAC Adjustment, Inc.

(s) Jack N. Shears
Jack N. Shears
Shears & Shears
Attorneys for Plaintiff
P.O. Box 2085
Ponca City, Oklahoma 74601
(405) 769-9984

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MAC ADJUSTMENT, INC. an Oklahoma Corporation, and B. J. GOSTING, Plaintiffs,	)	No.
vs.	)	CIV-76-0848-E
GENERAL ADJUSTMENT BUREAU, INC., a New York corporation, and PROPERTY LOSS RESEARCH BUREAU, an unincorporated association, Defendants,	)	

MEMORANDUM OPINION AND ORDER

Before LUTHER B. EUBANKS, United States District Judge.

The complaint alleges a combination and conspiracy by the defendants in restraint of trade in violation of the Sherman Act. Plaintiff[1] is an Oklahoma corporation "engag[ed] in the insurance adjustment business as an independent adjuster for various insurance companies both within and without the State of Oklahoma." Plaintiff alleges that the defendants undertook "a concerted attempt to injure and destroy the plaintiff's competitive position in the adjusting business" by influencing or coercing insurance companies to refrain from doing business with it.

[1] Gosting is identified in the complaint as "plaintiff's President." All the allegations in the complaint are in the singular. The court will follow this style and refer only to "plaintiff."

The defendants move for summary judgment[2] on the grounds that:

1. The provisions of the McCarran-Ferguson Act (15 U.S.C. § 1012) exempt them from liability under the Sherman Act; and

2. Their allegedly unlawful activity could have impact on only local, and not interstate, commerce.

Determination

The "MaCarran exemption" provides that the Sherman Act is "applicable to the business of insurance to the extent that such business is not regulated by State law." The threshold question is whether the activities complained of partake of the nature of "the business of insurance."

For the answer, the court first turns to the guidance offered by the Supreme Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458-460 (1969):

> ". . . [In enacting the McCarran-Ferguson Act] Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies. . . . The debates centered on these issues, and the Committee reports shed little light on the meaning of the words 'business of insurance.' . . . In context, however, it is relatively clear what problems Congress was dealing with. . . . The *South-Eastern*

[2] Defendant Property Loss Research Bureau has moved for order of dismissal, but joins in GAB's two arguments. The court is uncertain whether this defendant's references to res judicata and prior state court suits were made in the attempt to raise a third argument. Suffice it to say no documentation relating to a final judgment from a court of competent jurisdiction on the merits of this controversy as between these parties has been proffered. In any event, defendant's theory as to the impact of the doctrine of res judicata on a court's subject-matter jurisdiction is (necessarily) unclear.

> *Underwriters* decision threatened the continued supremacy of the States in [the] area [of regulating the dealings between insurers and their policyholders, their negotiations, and the contract which resulted]. The McCarran Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. . . .
>
> "Given this history, the language of the statute takes on a different coloration. The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, . . . and the licensing of companies and their agents . . . are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." (Citations omitted.)

The court has carefully studied defendant GAB's thorough brief and examined the cases relied upon therein.

The court has come to the conclusion, however, that the activities complained of herein do not partake of the nature of "the business of insurance" as defined by the Supreme Court. The activities complained of are not incidents of ratemaking, ratefixing, licensing or taxation, nor are they incidents of the contract between, or the contractual relationship between, insurers and their policyholders. The activities complained of—allegedly concerted attempts to disrupt the flow of business to plaintiff—are not peculiar to the insurance business; what they are peculiar to is the "[anti-] business of restraint" and as such they are not exempted by the McCarran Act from the reach of the Sherman Act but rather are "subject to paramount federal regulation."

National Securities is not on point factually with the case at hand. No case has been uncovered which is. However, in studying the myriad of opinions in which the McCarran Act has been discussed, the court has concluded that those relied upon by defendant[s] are less analogous[3] than the following: *Allied Financial Services, Inc.* v. *Foremost Ins. Co.*, 418 F.Supp. 157 (Neb. 1976); *American Fam. L. Assur. Co.* v. *Planned Mktg. Assoc., Inc.*, 389 F.Supp. 1148 (E.D. Va. 1974); *DeVoto* v. *Pacific Fidelity Life Insuranc Company*, 354 F.Supp. 874 (N.D. Cal. 1973), aff'd, 516 F.2d 1 (9th Cir. 1975), cert. denied, 423 U.S. 894 (1975). See also *Zelson* v. *Phoenix Mut. Life Ins. Co.*, 549 F.2d 62, 69 (8th Cir. 1977), and compare the above two cases, cited in note 11, with those cited in note 10. This court agrees with the Court of Appeals for the Eighth Circuit that while the holdings in *Allied Financial Services* and *American*

[3] For example, *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 406 F.Supp. 27 (D.C. 1975). That case involved a dispute over the adjustment and settlement of claims, plaintiffs alleging that defendants had agreed among themselves to fix prices for automobile repairs. The court held "claims-settlement procedures are clearly 'the business of insurance' as defined in *National Securities, Inc., supra.*" This court has no quarrel with that holding. It is simply not applicable here, where no allegation of any illegal claims adjustment procedure is made.

Family Life might be questionable,[4] they have had the prophylactic effect of discouraging the practice of defining the business of insurance as any activity in which an insurance company might be involved, and encouraging close scrutiny on a case-by-case basis of the factors set out in *National Securities.*

Given the foregoing, the question whether state law regulates the activities is immaterial. Nor need the court address plaintiff's argument that in any event it is entitled to the protection of § 1013(b).

Defendant GAB's second argument is that the required nexus between the alleged unlawful activities and commerce among the several states does not exist. The court is not prepared to discount the suggestion that at the heart of this lawsuit is a garden-variety claim of interference with business relations essentially local in character. No suggestion is intended thereby of pre-judgment on the merits of the claim as made. But the issue must be addressed inasmuch as the fact of restraint of interstate trade is not only an element of the claim, it is a jurisdictional prerequisite.

The court concludes that the issue cannot be resolved on the record as developed on this motion. The facts here are not as clear as in, e.g., *Frackowiak* v. *Farmers Ins. Co., Inc.*, 411 F.Supp. 1309 (Kan. 1976). At the pretrial conference herein, depending on the status of discovery, the determination will be made as to proper resolution, whether by way of supplemental briefs, oral argument and/or evidentiary hearing.

[4] "We have no doubt that much, and probably most, of an insurance company's dealing with its agents is within the guidelines established by *National Securities.*" *Zelson, supra* at 68; see also p. 69, note 12. *American Family Life* is criticized in *Lawyer's Realty Corp* v. *Peninsular Title Ins.*, 428 F.Supp. 1288 (E.D. La. 1977). At the core of *Lawyer's Realty*, however, was a dispute over the state insurance commissioner's refusal to renew the plaintiff's license.

Defendants' motions denied in part; ruling reserved in part.

IT IS SO ORDERED.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 23 day of August, 1977.

(s) Luther B. Eubanks
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MAC ADJUSTMENT, INC., an Oklahoma corporation and B. J. GOSTING,	Plaintiffs,	NO. CIV-76-0848-E
v.		
GENERAL ADJUSTMENT BUREAU, INC., a New York corporation and PROPERTY LOSS RESEARCH BUREAU, an unincorporated association,	Defendants.	

ORDER SUSTAINING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

NOW on this 15th day of September, 1977, there comes on for evidentiary hearing the motions of defendants General Adjustment Bureau, Inc. and Property Loss Research Bureau for summary judgment. The Court, after hearing testimony of B. J. Gosting and receiving documentary evidence and hearing argument of counsel, being fully advised in the premises finds and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants' Motions for Summary Judgment should be and the same hereby are sustained on the grounds and for the reasons that the acts complained of did not substantially affect interstate commerce, all as is more particularly set forth in the transcript of this hearing which includes the sworn testimony, the exhibits offered and argument of counsel.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be dismissed.

UNITED STATES DISTRICT JUDGE
LUTHER B. EUBANKS

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1986

MAC ADJUSTMENT, INC., an Oklahoma corproation, and B. J. GOSTING, Plaintiffs-Appellants, v. GENERAL ADJUSMENT BUREAU, INC., a New York corporation, and PROPERTY LOSS RESEARCH BUREAU, an unincorporated association, Defendants-Appellees.	)	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-76-0848-E)

Before McWILLIAMS and DOYLE, Circuit Judges, and MARKEY, Chief Judge.*

DOYLE, Circuit Judge.

This is an antitrust action which is alleged to have arisen under Section 1 of the Sherman Act, 15 U.S.C. Section 1. The trial court decided the case after a pretrial conference and after hearing evidence on a limited aspect of the case, namely, whether or not there was sufficient impact on interstate commerce to justify the assumption of jurisdiction on its part. The court held, following the

* Of the United States Court of Customs and Patent Appeals, sitting by designation.

hearing, that there was insufficient evidence to support a finding that the acts of the defendants had a substantial effect on interstate commerce. It sustained the defendants' motions for summary judgment which had been filed.

The testimony given was that of the plaintiff Gosting, the president of Mac Adjustment, Inc. (Mac), alone and it pertained to the extent to which his business was in commerce. Apparently the trial court concluded that his activities were not sufficiently extensive to be regarded as beinng substantially involved in commerce.

The plaintiffs' theory of the case is set forth in a general way in the complaint. It alleged that the defendants conspired to eliminate Mac's business as an independent insurance adjuster. The General Adjustment Bureau, Inc. (GAB), one of the defendants, operates an insurance adjustment business throughout the United States. Property Loss Research Bureau, the other defendant, is an unincorporated association of some 100 insurance companies. One of the association's members was Iowa Mutual Insurance Company.

The allegation in the complaint is that the defendants acted in concert to coerce insurance companies, including Iowa Mutual, not to use Mac as an independent adjuster. It is alleged that this coercion was successful as a result of the issuance of false statements by GAB in which it was claimed that the plaintiff was too generous in adjusting losses, in particular the losses from a storm in Tonkawa, Oklahoma, in November of 1973. It is alleged that these statements were made to Iowa Mutual, Southwest Adjustment Company (a company which provided about 75% of MAC's business), various insurance agents, and some individual insureds. Most of the storm losses were covered by Iowa Mutual. The defendant GAB was engaged to audit and readjust plaintiffs' previous adjustments of these losses. The conspiracy to destroy the plaintiff's business allegedly resulted from a series of meetings which took place in relationship to this auditing procedure.

Mac Adjustment was started in 1972, after GAB terminated Mr. Gosting's employment. It had prospered until late 1973, and thereafter the business declined, until by 1976 there was almost nothing remaining. Another allegation in the complaint was that plaintiffs were deprived of a listing in a trade publication which served to notify the trade that Gosting was in business. GAB refused to verify Gosting's having been employed as a GAB adjuster from 1963 to 1972.

Also, GAB and the insurance companies allegedly agreed to uniform practices and procedures to be used in the adjustment and settlement of claims. These standards and the "quality control checks" GAB performed on other adjusters allegedly gave GAB an unfair advantage.

Due to the fact that the complaint was vague as to the extent to which Mac was engaged in interstate commerce, the trial court, following a pretrial conference, decided that since it was a jurisdictional matter, evidence should be offered at a special hearing on this question.

On September 15, 1977, the testimony of Mr. Gosting was given before the trial court in Oklahoma City. The testimony generally addressed the question whether the plaintiffs were actually engaged in interstate commerce. He testified that he represented 180 insurance companies. A large number of these representations were obtained through Southwest Adjustment with which he had a business connection, and from this connection investigations were apparently referred to Mac. Gosting testified that a vast majority of these companies were in states other than Oklahoma where his office was located.

One gets the impression from reading the testimony that most of Mac's investigations were conducted inside Oklahoma, although some of the work was indeed outside of Oklahoma, but Mac did have this contractual agreement for adjustment services with Southwest Adjustment Company. Gosting spoke of representing a number of insurance

companies who had offices outside of Oklahoma which required him go to to their home offices from time to time. Mac had written contracts with adjusting companies from other states, but there were few written contracts with insurance companies, if any. These tended to be oral.

Gosting testified that his company agreed with the insurance companies it represented to go anywhere in the world for adjustment purposes, but he quickly admitted that it would not be feasible for him to pursue an investigation in Australia and that it would be better to have a local agent do it.

In answers to interrogatories it was shown that Mac competed with adjusting firms in Oklahoma, but Mac could not point to any firms outside of Oklahoma with which it had competed. The only state in which Gosting was licensed as an insurance adjuster was Oklahoma, but there were some kinds of arrangements which allowed him to function in other states even though he did not have a license issued from other states. He could do this on the basis of having the license in Oklahoma. He persisted, however, in contending that it was necessary to travel across state lines in some of his investigations of storms, fires, and automobile losses. However, a review of the exhibits shows that only 18 adjustments, at the most, out of 1400 or 1500 required Gosting or Mac's employees to travel outside of Oklahoma. The out-of-state assignments, for the most part, were trips to neighboring Kansas. Additional cases involved telephone calls for mail across state lines as commerce. Some of the assignments completed in Oklahoma involved adjustments on shipments which had come from outside Oklahoma and had come to rest there.

The appellants, Mac and Gosting, maintain that the adjustment and settlement of claims is an integral part of the insurance business. Accordingly, since many insurance companies conduct their business in commerce by soliciting policies, collecting premiums, and paying claims outside

of Oklahoma and in other states, the adjustments made by Mac must be regarded as an integral part of the interstate insurance business.

It is not too simple or easy to link the insurance business with interstate commerce. For a long time, the position that the Supreme Court took was that the insurance business was not interstate commerce. However, in 1944, it decided United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), which held that the insurance business, although not necessarily in interstate commerce, could be engaged in this kind of commerce. There the charge was that there existed a conspiracy to fix insurance rates in a number of states, and the simple question was whether the Sherman Act prohibited this. The district court has held that the Sherman Act did not apply since the insurance business did not constitute trade or commerce within the meaning of the commerce clause. The Supreme Court had to decide this exact question. The price fixing activities affected commerce because premiums were collected, policies were transmitted, and claims were paid throughout the United States. Also, a nationwide business was not deprived of its interstate character merely because it was built on local sales contracts with policyholders. So, the thrust of the Supreme Court's decision was that under the evidence before it, South-Eastern Underwriters Ass'n was engaged in commerce and was subject to the Sherman Act. It is not, however, an across-the-board decision and therefore had a tendency to be restrictive.

In any event, Congress enacted the so-called McCarran-Ferguson Act, 15 U.S.C. Section 1011 *et seq.*, the purpose of which was to guarantee that states could continue to regulate the insurance rates. This measure also provided that the Sherman Act applied to the business of insurance only to the extent that such business was not regulated by state law. The Act also provided an exception, whereby the Sherman Act continued to apply to an agreement to boycott, coerce or intimidate in relation to the business of

insurance. *See* 18 U.S.C. Section 1013(b). It is this boycott aspect and coercion feature that the plaintiffs rely on and emphasize. Mac contends that the defendants-appellees used fraud and deceit in order to destroy its business.

The main injury complained of was that Mac's business gradually diminished as a result of GAB communicating to an insurance trade association, companies, and agents that Mac's adjustment work was incompetent and dishonest and that Mac oversettled claims or (in other words) paid too much.

The essence of the trial court's decision was that the plaintiffs were not in the business of insurance as that is defined by the Supreme Court, and so the consequence would be that the restraints were not beyond the reach of the Sherman Act because of any exemption under the McCarran-Ferguson Act. This particular ruling has not been appealed.

The ruling that the plaintiffs are not in the business of insurance for the purpose of the McCarran-Ferguson Act creates somewhat of a difficulty because, as a consequence, they must establish that they are in the business of insurance in order to satisfy the interstate commerce requirement of the Sherman Act. It is, of course, possible to argue that the insurance adjustment business is independent of the Supreme Court's decision in South-Eastern Underwriters Ass'n, *supra*, that the McCarran-Ferguson Act does not apply and that Mac was engaged in interstate commerce, but there is a question as to whether anything is gained by taking this tack because you cannot get away from the fact that this is, if not the insurance business, so closely related to it that it is not distinguishable from it. So, the commerce element is more likely present by the approach of insurance as commerce.

The difficulty which we find with the judgment is that there is not any evidence to review to speak of because the only testimony that was offered was that of Mr. Gosting

in a special hearing that grew out of the filing of the motions for summary judgment. The purpose of the hearing in the trial court was to determine whether or not the plaintiffs were engaged in interstate commerce and whether the activity had a substantial impact or effect on the commerce. No doubt the ultimate question is whether this was an atmosphere of commerce so that the alleged restraints or obstructions on Mac's business created a sufficient impact on commerce. It is rendered all the more complex by the fact that the trial court appeared to be requiring a great impact on commerce, one that this small company was incapable of producing. Certainly the effect on commerce cannot be tremendous in a total social sense if the company which is the object of the conspiracy is small. Nevertheless, if the company is engaged in interstate commerce, it is entitled to the protection of the antitrust law and particularly so if the conspiracy succeded in putting it out of business. *See, e.g.*, Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 745-46 (1976); DeVoto v. Pacific Fidelity Life Insurance Co., 516 F.2d 1 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975); Yellow Cab Co. v. Cab Employers, Automotive & Warehousemen, Local #881, 457 F.2d 1032 (9th Cir. 1972).

The testimony of Mr. Gosting is not satisfactory because it is limited to the kinds of activities in which he engaged—how frequently he traveled to other states, why he did so, what he did in these other states and so on, but it did not deal at all with the injuries that were allegedly inflicted by the defendants and so that facet of effect upon commerce was not explored at all.

A further problem is that the judgment of the district court contained no findings of fact. It merely concludes

in most general terms that there was not a substantial impact on commerce. The wording of that final decree is such that one gets the impression that it had to be an impediment of a very major kind in order for the plaintiffs to prove a case. Actually if the plaintiffs were able to establish an unreasonable restraint on interstate commerce, and were able to establish that they were engaged in interstate commerce, then they would be entitled to go to the jury or to have the court consider the matter of establishing liability. The narrowness of the hearing leaves a reviewing court with a question as to whether other evidence existed which, if the trial had been full-scale, would have produced a prima facie showing.

There is, of course, no provision in the Rules of Civil Procedure for having a hearing of the kind that was here conducted, that is, an *in limine* hearing to decide whether or not the plaintiffs could sufficiently satisfy the jurisdictional requirement of being engaged in interstate commerce so as to justify going to trial.

Our disposition is, therefore, to remand the case for further proceedings to enable the trial court to take any further action that may be necessary in order to prepare the case for trial or to give, at least, the plaintiffs an opportunity to make a further showing if they have additional evidence which would add to this picture of carrying on business in interstate commerce and of the defendants restraining the flow or substantially affecting interstate commerce.

The judgment here was entered pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. It was not, however, an orthodox summary judgment proceeding in that an evidentiary hearing was held. It is fundamental that summary judgment is appropriate if and only if there is no genuine issue as to any material fact. Only then is the moving party entitled to a judgment as a matter of law. What we are saying above is that the record does

not demonstrate that there exists no genuine issue as to any material fact whereby the movants would be entitled to judgment as a matter of law. When such an issue of fact is present, summary judgment is not appropriate.

In the case at bar the issue as to whether the plaintiffs-appellants were engaged in interstate commerce and whether the impact on commerce was substantial are connected and considered singly or together are factual.

The summary judgment rule in an anntitrust case is that the summary procedures are to be used sparingly. Thus

> Where it [the record] establishes a *per se* violation of the anti-trust laws, summary judgment is proper, but, in other situations, where the impact of the alleged violation is too little known, and the bare bones of the paper record are insfficient to pass judgment thereon, a trial should be had. Both factual inferences and the record as a whole must be viewed in the light most favorable to the party opposing summary judgment. And summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, or the proof is in the hands of the movant.

6 Moore's Federal Practice Para. 56.17[5], at 56-741 to 56-743 (2d ed. 1976). The record in this case is, to say the least, sketchy and it fails to demonstrate beyond a reasonable doubt that there is no question of fact to be tried.

The Supreme Court in recent opinions has considered what is necessary in order to satisfy the commerce requirement of the Sherman Act. Thus in Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976), the Supreme Court held that:

> It is settled that the Act [Sherman Act] encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have

> their sole impact on interstate commerce. "[W]holly local business restraints can produce the effects condemned by the Sherman Act." *United States* v. *Employing Plasterers Ass'n.*, 347 U.S. 186, 189 (1954). As long as the restraint in question "substantially and adversely affects interstate commerce," *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 187, 195 (1974); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S., at 234, the interstate commerce nexus required for Sherman Act coverage is established. " 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' " *Gulf Oil Corp.* v. *Copp Paving Co., supra*, at 195, quoting *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949). . . . It was sufficient for us that the allegations in the complaint, if proved, could show that the conspiracy resulted in "*unreasonable burdens on the free and uninterrupted flow* of plastering materials into Illinois." 347 U.S., at 189 (emphasis added).

425 U.S. at 743, 746.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court considered the interstate commerce requirement where the activity restrained (title examination) was an integral part of the transaction (financing home purchases). In that case significant amounts of the loan money came from outside the state, and the lenders required a title examination before loans could be granted.

These two cases we regard as valuable in determining the applicable commerce standards required by the Sherman Act.

In addition to those cited in the *Hospital Building Co.* and *Goldfarb* cases, there is a decision of the Third Circuit, Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884 (3d Cir. 1977), which is useful and should prove

to have value on remand, for *Mortensen* considered the jurisdiction problem arising from treating interstate commerce and the impact on commerce as a jurisdictional matter and as an element in a Section 1 Sherman Act case. The framework of the opinion is not unlike that at bar because it was disposed of on a motion for summary judgment by the district court. The opinion of the appellate court was written by Judge Hunter. It was painstaking and careful. It considered at length the commerce problem in an antitrust case as it affects jurisdiction and as it affects the merits.

Based upon the foregoing, the judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with the views expressed herein.

APPENDIX E

MAY TERM—MAY 30, 1979

Before Honorable Oliver Seth, Chief Judge,
Honorable Robert H. McWilliams, Circuit Judge,
Honorable James E. Barrett, Circuit Judge,
Honorable William E. Doyle, Circuit Judge,
Honorable Monroe G. McKay, Circuit Judge,
Honorable James K. Logan, Circuit Judge,
Honorable Howard T. Markey, Chief Judge*

MAC ADJUSTMENT, INC., an Oklahoma corporation, and B. J. GOSTING, Plaintiffs-Appellants,	)	
vs.	)	No. 77-1986
GENERAL ADJUSTMENT BUREAU, INC., a New York corporation, and PROPERTY LOSS RESEARCH BUREAU, an unincorporated association, Defendants-Appellees.	)	

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellees General Adjustment Bureau, Inc., and Property Loss Research Bureau.

Upon consideration whereof, the petition for rehearing is denied.

Judge Holloway did not participate in this proceeding.

(s) Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

* of the United States Court of Customs and Patent Appeals, sitting by designation